Supreme Court, U.S.
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No. 99-1410

In the
Supreme Court of the United States

FIRST MOUNT VERNON, I.L.A.,
Petitioner

-versus-

PRINCE GEORGE'S COUNTY, MARYLAND
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ORDINANCE PROVISIONS INVOLVED IN THIS CASE

COUNTY CODE

Prince George's County, Maryland County Code, Sec. 4-122 (1991 edition):

> (a) The following amendments, additions, and/or deletions are hereby made to Section 120.0 of the BOCA Code:
>
> > (1) The text of Subsection 120.3, "Notice of unsafe Structure," is amended as follows: If an unsafe condition is found in a building or structure, the Building Official shall serve on the owner, agent or person in control of the building or structure a written notice describing the building or structure deemed unsafe and specifying the required repairs or improvements to be made. . .

BOCA NATIONAL BUILDING CODE

BOCA National Building Code, Section 201: General Definitions (1990):

> Owner: Any person, agent, firm or corporation having a legal or equitable interest in the property.

STATEMENT OF THE CASE

Petitioner has omitted several undisputed facts that were material to the decisions below.

A. Procedural History

This petition arises from an action originally filed in the United States District Court for the District of Maryland (Greenbelt). First Mount Vernon, I.L.A., Petitioner-Appellant (hereinafter referred to as "Petitioner") filed suit against the Prince George's County, Maryland, Respondent-Appellee (hereinafter referred to as "the County"), alleging a violation of 42 U.S.C. Section 1983 based on allegations that the County violated its right to procedural due process when it demolished a residential structure pursuant to Court Order issued by the District Court of Maryland. Petitioner also alleged that the County's actions constituted a taking of its property for which the County failed to give just compensation.[1] Finally, Petitioner alleged that the County negligently caused it injury by demolishing its property.

After being served with the Complaint, the County filed a timely Motion to Dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) and 12(b)(7). In its Motion to Dismiss, the County argued: (1) that Plaintiff has failed to join a necessary party; (2) there was no Due Process violation as the County gave proper and adequate notice in compliance with the provisions of the Prince George's County Code ("County Code") and applicable case law; (3) there was no constitutional taking since the County was acting pursuant to its police powers, and Petitioner f had not established that the actions of the County have deprived it of all beneficial use of

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[1]Petitioner also alleged Maryland constitutional violations which are parallel to its federal constitutional claims.

the property; and (4) the County did not breach a duty to Petitioner and thus there is no viable negligence claim. Petitioner filed an Opposition Memorandum to this Motion to which the County filed a Reply.

On September 25, 1998, the Honorable Deborah K. Chasanow, by Memorandum Opinion, granted the County's Motion to Dismiss. The Court found that the County gave all the notice that was due and that County's destruction of the property was not a taking to which Petitioner was entitled to compensation. The Court did not make any ruling regarding the Petitioner 's negligence claim. Neither did the Court address the County's arguments regarding failure to join a necessary party.

Petitioner filed an appeal to the Fourth Circuit Court of Appeals. The only issue Petitioner has raised on appeal is the District and Circuit Court rulings that there was no due process violation committed by the County. Petitioner has not raised the issue of the court's finding that the County's actions did not constitute a taking so as to entitle Plaintiff to compensation, and thus this issue is waived. On September 21, 1999, the Fourth Circuit affirmed the decision of the District Court.

B. Undisputed Facts

On or about November 24, 1992, the County posted an unsafe and condemned notice on the residential structure located on the property known as 4805 Nash Street, Chapel Oaks, Maryland ("the property"). (JA 4).[2] On or about December 1, 1992, the County issued written notice to the record owners of the property, John and Minnie Watson, of the various housing and building violations. *Id.*

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[2] References to "JA[page]" are to the Joint-Appendix filed in the Court of Appeals.

John and Minnie Watson failed to abate the conditions as required by the violation notice and the County later commenced legal proceedings in the District Court of Maryland. *Id.* The County filed a Petition for Injunction for the Enforcement of Building and Housing Codes ("Petition for Injunction") on or about December 15, 1993 and served the owners. (JA 12-15). On May 11, 1994, the District Court entered a Default Order allowing the County to demolish and remove the residential structure located on the property. (JA 5, 21-23). In said order, the court noted that the defendants had been duly served. (JA 22). On May 25, 1994, John and Minnie Watson transferred the property to their grandson, Roy T. Watson. (JA 5). On June 2, 1994, Roy Watson filed a Motion to Stop Execution of the Order of Injunction to Enforce Housing Code and Building Code by Demolition; and a Motion to Vacate Order of Injunction to Enforce Housing Code and Building Code ("Motion to Stop Execution and Vacate Order"). (JA 5-6, 28-31).

Over the next several months, the state district court continued the proceedings on several occasions in order to allow Mr. Watson an opportunity to rehabilitate the residential structure. (JA 6-7). It was during this time period, specifically December 1994, when Plaintiff obtained an interest in the property pursuant to a Deed of Trust executed between Plaintiff and Roy Watson. (JA 6, 36-37). Neither Plaintiff nor Watson advised the County or the state district court of the change in ownership. On May 8, 1996, the Court issued an Order authorizing the County to enforce the Order issued on May 11, 1994 and granted full authority to the County to abate the unsafe conditions on the property by demolition and removal. (JA 7, 38-41). In July 1996, Roy Watson filed a Motion to Stay Order and Vacate Order which was denied by the Court on August 26, 1996. (JA 7). The

residential structure was demolished by the County on or about August 30, 1996. *Id.* [3]

ARGUMENT

A. The Fourth Circuit and the District Court did not err in dismissing Petitioner's claim.

The County did not violate Petitioner 's due process rights. At the time when the County was required to give adequate notice, Petitioner had no interest in the property. Due process requires that notice be given which is reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950). Notice by mail, or some other method as certain to ensure actual notice, is required if a party's name and address are reasonably ascertainable. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712 (1983).

The lower Court correctly found that the County gave all the notice that was due in this case. Clearly Petitioner was not a reasonably ascertainable party when the County posted notice on the structure or when proceedings in the state district court proceeding commenced. As a matter of fact, Petitioner had absolutely no interest in the property at that time. Thus, the County was not required to give Petitioner notice of the pending proceedings.[4]

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[3] It should be noted that the information contained in the first full paragraph on page six of Petitioner's Brief are not supported by any facts that are a part of the record before the Fourth Circuit or the District Court.

[4] Petitioner argues that the County concedes that Petitioner was a reasonably ascertainable party because in the County stated, "the facts are essentially undisputed". Petitioner Brief, p. 13. The County never conceded this point. There are no factual statements in the Complaint

The appropriate inquiry as to whether a party is "reasonably ascertainable" relates back to the time when notice is given at the commencement of an action. *See Nitchie Barrett Realty Corp. v. Biderman*, 704 F.Supp. 369, 372(S.D.N.Y. 1988)(Court held that *Mennonite* decision requires only that notice be sent to a "reasonably ascertainable" interested party at the time the action commenced). Although not stated as explicitly, this same principle is illustrated in several other cases. A factual review of several Supreme Court decisions makes this point.

In *Mennonite*, the mortgagee who claimed to have been deprived adequate notice of the tax sale recorded its interest in the subject property in March 1973. The County did not institute proceedings pertaining to the tax sale until 1977. *Mennonite*, 462 U.S. at 792-794, 103 S.Ct. at 2708-2709. Thus, not only was the mortgagee an interested party at the time proceedings commenced, but it was also a reasonably ascertainable party as its property was already recorded. This is not the case of Plaintiff in the instant action.

In addition, the cases discussed in *Mennonite* as examples where the Supreme Court has "unwaveringly" adhered to principle of *Mullane* also deal with situations where the party alleging a due process violation acquired its interest in the property prior to the commencement of the relevant proceedings. *Id.* at 497, 103 S.Ct. at 2710. *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200 (1956), involved a situation where appellant's name was known to the city and was on the official records when the city instituted condemnation proceedings. *Id.* at 116, 77 S.Ct. at

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that stated that Petitioner was a reasonably ascertainable party. Moreover, in all of the pleadings filed during the litigation of the case, the County has consistently maintained that Petitioner was not a readily ascertainable party.

202. In *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279 (1962), the Court noted that appellant's name and address were readily ascertainable from deed records and tax rolls at the time notice of the condemnation proceedings were published and posted. *Id.* at 210, 83 S.Ct. at 281. Finally, *Greene v. Lindsey*, 456 U.S. 444, 102 S.Ct. 1874 (1982), dealt with a situation where the County initiated detainer actions against tenants of a housing project. When the County initiated those proceedings, all of the appellees were tenants of the housing project. *Id.* at 446, 102 S.Ct. at 1876.

Circuit Courts have consistently applied this principle. In *Elmco Properties, Inc. v. Second National Federal Savings Assoc.*, 94 F.3d 914 (4th 1996), the Fourth Circuit held that, pursuant to Mullane, "a party with an identified, **present** property interest whose address is known or reasonably ascertainable is entitled to mailed notice..." (Emphasis added). *Id.* at 921. In that case, the appellant acquired its interest prior to the receivership proceedings. *Id.* at 917-918. The Court found that the appellant's due process rights were violated because appellant was not mailed notice of the proceedings and the appellee was aware of appellant's interests and knew appellant's address. *Id.* at 921.

Similarly, the First Circuit held that knowledge of the likely effectiveness of notice must be measured from the moment that the notice was sent. *Sarit v. U.S. Drug Enforcement Admin.*, 987 F.2d 10 (1st Cir. 1993) *cert. denied* 114 S.Ct. 241 (1993). The Court held that *Mullane* has generally not been interpreted to require a party to make additional attempts beyond notice that is legally satisfactory at the time that it is sent. *Id.* at 14.

The essential and common theme in all of these cases is that the property owner had an interest in the property that was either actually known by the governmental entity or was reasonably ascertainable by the government when the

relevant proceedings were initiated. That important fact is missing in the instant action. When the County posted notice of the unsafe conditions and instituted the demolition proceedings, Petitioner was not an interested party. Petitioner did not obtain an interest in the property until one year after the proceedings in district court began. Logically, therefore, Petitioner also was not a party whose identity was reasonably ascertainable.

Furthermore, Petitioner 's interest in the property never became known to the County prior to the demolition of the residential structure. Petitioner does not allege that the County ever became aware of its interest in the property, or even its identity, prior to the demolition. Instead, Petitioner alleges, without factual support, that: (1) the County district court allowed Mr. Watson time to obtain financing to rehabilitate the property and (2) the County failed to notify Plaintiff despite knowledge that financing was obtained. (JA 6-7).

Even if these allegations are liberally construed in favor of Petitioner, they do not establish that the County knew of Petitioner 's interest in the property. The fact that the District Court allowed time for Mr. Watson to obtain financing does not lead to the conclusion that the County knew that the financing was secured by the subject property. For example, the financing could have been an unsecured personal loan or a loan secured by other property owned by Mr. Watson. Moreover, considering that the district court lifted its stay of the order giving the County permission to demolish the structure, it is clear that Mr. Watson **never** rehabilitated the property, i.e. he obviously never used the loan from Petitioner for its ultimate purpose. As such, there is absolutely nothing in the record that establishes that Mr. Watson obtained financing secured the property at issue or

that the County had knowledge of Petitioner 's interest in the residential structure that was demolished.[5]

It is also clearly established on the record of this case that the County gave adequate notice to the "readily ascertainable" and interested parties. The County provided adequate and proper notice regarding the demolition of the residential structure as required by the procedures set forth in the Prince George's County Code (County Code) and applicable case law. The County's building regulations are set forth in Subtitle 4 of the County Code wherein the County adopted the BOCA National Building Code subject to some amendments. County Code, Section 4-101. The relevant notice requirements in effect at the time the state court case commenced read as follows:

> (a) The following amendments, additions, and/or deletions are hereby made to Section 120.0 of the BOCA Code:
>
> > (1) The text of Subsection 120.3, "Notice of unsafe Structure," is amended as follows: If an unsafe condition is found in a building or structure, the Building Official shall serve on the *owner, agent or person in control of the building or structure* a written notice describing the building or structure deemed unsafe and specifying the required repairs or improvements to be made. . .

County Code, Sec. 4-122 (1991 edition) (emphasis added). Furthermore, the BOCA National Building Code defines

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[5] Thus, Petitioner's statement in its brief that the County knew that "the owner of the property was seeking a mortgage to rehabilitate the property..." is totally inaccurate and not supported by the record in this case.

owner as "any person, agent, firm or corporation having a legal or equitable interest in the property". BOCA National Building Code, Section 201.01 (1990)

The County ordinance is constitutional. It mandates written notice to those persons who are readily ascertainable at the time when written notice is required. At the time that this written violation notice was required, Plaintiff was not the owner, agent or person in control of the building, and in fact did not have any legal interest the property. Thus, it was not necessary to give Plaintiff notice. Plaintiff admits that the violation notice was given to the record owners. (JA 4). Therefore, the County also provided the notice required under the Code.

Proper and adequate notice was also given of the legal proceedings in County district court regarding the Petition for Injunction. When those proceedings began, John and Minnie Watson were the owners of record and it is uncontested that they were given notice. Roy Watson stated in his Motion to Stop Execution and Vacate Order that "Plaintiff [the County] served upon the defendants. . .by registered mail the order to show cause in this case." (JA 30). More importantly, the County district court found as a fact "that Defendants, who owns the Subject Property, have been duly served" (JA 22). In addition, it is also uncontested that John and Minnie Watson, via their grandson and successor-in-interest, Roy Watson, were given an opportunity to be heard, as evidenced by the motions filed by Mr. Watson. (JA 5-7, 29-31).

B. There is not conflict between the circuits as the cases cited by Petitioner are clearly distinguishable from the facts of the present case.

Petitioner relies heavily on a case from the Eighth Circuit, *Kornblum v. St. Louis County, Mo.*, 72 F.3d 661 (8th Cir. 1995) *cert. denied* 116 S.Ct. 1677 (1996), as support for

its position that the County in this instance violated Plaintiff's constitutional rights. In that case, Mr. Kornblum purchased property after the County had initiated proceedings to demolish the structure. The County mailed notice to the record owner that the property had been declared a nuisance but the record owner had died prior to the mailing. In addition, a County ordinance required the County to file and record the notice with the County Recorder and Deeds but the County failed to do so. *Id.* at 662. The Eighth Circuit held that the notice given in that case was not sufficient. *Id.* at 663-664. The holding in *Kornblum*, however, was limited **to the facts of that case.** *Id.* Those facts are clearly distinguishable from the facts in the instant matter.

First, the Court found that the notice to the record owner was defective. *Id.* at 664. In the instant matter, however, there is no dispute that the County's notice to the record owners was adequate and effective. Second, one of major underpinnings of *Kornblum's* decision was the County's failure to abide by the local ordinance which required recordation of the notice. The Court stated that had the County simply followed the ordinance, *Kornblum* would have had constructive notice. *Id.* at 664. In the instant case, however, the County fully complied with all applicable ordinance provisions. As stated previously, the County provided the proper notice in accordance with the County Code and there was no ordinance which required the County to record any notice with County Land Records. Moreover, it is clear that constitutional due process does not require special notice of the type set forth in the St. Louis ordinance. *Mullane*, 339 U.S. at 317, 70 S.Ct. at 659.

Finally, the *Kornblum* Court stated that the County's delay in demolishing the property contributed significantly to the inadequacy of the notice in that case. *Kornblum*, 72 F.3d at 664. The hearing officer issued an order in October 1987 that the property should be demolished but St. Louis did not

demolish the property until six months after the order was issued. *Id.* at 662-663. The Court reasoned that because St. Louisdelayed in demolishing the building, it created a foreseeable risk that a different set of interested parties might now be affected by its actions. *Id.* at 664. In the instant matter, however, no such delay was caused or created by the County. Any delay in this case was caused by Mr. Watson's successful requests to stay the court order allowing demolition. When the court finally lifted its stay, the County demolished the property within four days. (JA 7). Thus, the same type of delay and foreseeable risk that was created by St. Louis in *Kornblum*, was not created by the County in the instant matter. In sum, there are several important and dispositive differences between the facts of this case and those which existed in *Kornblum*.

The Petitioner's reliance on *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883 (5th Cir. 1989) and *Island Financial, Inc. v. Ballman*, 607 A.2d 76 (Md.App. 1992) is also misplaced. Those cases specifically dealt with local statutory provisions which required certain property owners to request notice of foreclosure proceedings. *Small Engine*, 878 F.2d at 885-886; *Island Financial*, 607 A.2d at 78. The Court in *Small Engine* specifically stated that it was the "scope of the statute with which we are **solely** concerned. . ." *Small Engine*, 878 F.2d at 892 (Emphasis added). However, there is no similar issue in the instant matter. The County Code does not require property owners to requests notice. Instead, the Code requires that persons with an equitable or legal interest in the property receive written notice of the unsafe conditions. As stated previously, at the point when written notice was required, Petitioner had no interest in the proceedings.

Another important distinction between those cases and the instant matter is that the appellants in *Small Engine* and *Island Financial* obtained interest in the property **prior**

to the relevant court proceedings. In *Small Engine*, the appellant purchased the property in 1980. The petition for foreclosure was filed on November 15, 1987. *Small Engine*, 878 F.2d at 884-885. In *Island Financial*, the appellant obtained an interest in July 1989 and the foreclosure proceeding was initiated on November 7, 1990. *Island Financial*, 607 A.2d at 77. The Court of Special Appeals stated that "[a] simple title scan from the time the property was acquired by the current owner to the **initiation of the foreclosure proceedings** would have provided adequate notice of Island's interest in the property." *Id.* at 80 (Emphasis added). In that case, the Court found that the appellant was readily identifiable and required notice of the proceedings although they did not comply with the statutory provisions requiring them to request notice. *Island Financial*, 607 A.2d at 82. The Court also noted that appropriate time period for conducting the title search concluded with **the initiation of the court proceedings**, not thereafter. This contradicts Petitioner's contention in this case that the County was required to give notice despite that fact that Petitioner did not acquire its interest until one year after initiation of the court proceedings.

Petitioner 's reliance on Maryland rules and statutes in the area of foreclosure and tax sales is also misplaced. There are no comparable notice requirements in he rules or statutes regulating demolition proceedings. As a matter fact, the regulations regarding demolition proceedings were adhered to by the County. Had the legislature intended to impose similar notice requirements in the context of demolition proceedings as those required in the areas of foreclosure and tax sales, it would have done so. Absent such action, however, there is no support for Plaintiff's argument the County failed to provide adequate notice especially when the relevant statute does not require such notice.

Finally, Petitioner 's reliance on *Mennonite* is misplaced since the argument is taken out of context. While *Mennonite* does say that a party's ability to safeguard its interest does not relieve the State of its constitutional obligation, in that case the party's interest existed at the time the state commenced proceedings and the party's identity was reasonably ascertainable. *Mennonite*, 462 U.S. at 799, 103 S.Ct. at 2712. Clearly, if Petitioner had an interest in the property and was reasonably ascertainable at the time the County issued notice and began its proceedings in the county district court, then adequate notice would have been sent pursuant to the requirements of due process. However, these are not the facts of this case. Petitioner bears responsibility in ascertaining the nature of the property that it acquired more than a year after commencement of demolition proceedings and two years after notice of unsafe conditions was posted on the residential structure.

Petitioner is a sophisticated commercial lender who acquired interest in property that contained a dilapidated residential structure. Petitioner obtained this interest notwithstanding posted notice on the structure and the pending district court proceedings, and Petitioner easily could have discovered the impending demolition had it checked. As the trial court correctly noted, the burden is not on the County to continually find new owners after a proceeding has begun, the burden is on Plaintiff to use due diligence and carefully investigate the nature of the property they are acquiring. Petitioner's Brief at 8a. Furthermore, as the Supreme Court stated, the property owner "usually arranges means to learn of any direct attack upon his. . .proprietary rights." *Mullane*, 339 U.S. at 316, 70 S.Ct. at 658.

In sum, Petitioner 's claim that the County violated its due process rights must fail. Petitioner had no interest in the property when the County issued written notice of the

unsafe condition nor when the County commenced demolition proceedings. Moreover, the County never obtained knowledge of Petitioner 's interest prior to the demolition of the structure. Interpreting the rulings of *Mullane* and *Mennonite* as Petitioner urges would essentially turn the jurisprudence of due process on its head by requiring the government to continually check for new potential owners of a property throughout the duration of a proceeding. Not only is this task impossible, but the futility of such efforts is enormously apparent.

CONCLUSION

There is no compelling reason to grant the writ of certiorari. The decision of the Fourth Circuit and the District Court was not error and correctly adhered to the mandates of due process as they applied to the facts of this case. Furthermore, the decisions of the Fourth Circuit and District Court are not in conflict with other circuit decisions whose facts are similar to the facts of the instant matter.

The writ of certiorari should be denied.

Respectfully submitted,

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